FILE COPY.

In the Supreme Court

of the

United States.

OCTOBER TERM, 1905.

Office Supreme Court U. S.
FILED
FEB 16 1906
JAMES H. McKENNEY,
Clerk.

No. 27

THE CITY OF MONTEREY,
Plaintiff in Error,

vs.

DAVID JACKS,
Defendant in Error.

NOTICE OF MOTION, MOTION AND ARGUMENT ON MOTION TO DISMISS AND AFFIRM.

JOHN GARBER,
Counsel for Defendant in Error.

FREDERIC D. McKENNEY,
Of Counsel.

Filed this.....day of February, 1906.

....., *Clerk,*

By ..... *Deputy Clerk.*

HIESTER, *Printer*, 559 California St.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 274.

THE CITY OF MONTEREY,
Plaintiff in Error,
vs.
DAVID JACKS,
Defendant in Error.

NOTICE OF MOTION TO DISMISS OR TO AFFIRM.

To the City of Monterey, Plaintiff in Error, and to Hamilton Gay Howard, Esq., its counsel:

Please take notice that on Monday, the 12th day of March, A. D. 1906, at the opening of court on said day, or as soon thereafter as counsel and said cause can be heard, the motions of which the annexed are copies will be submitted to the Supreme Court of the United States, at its court room, in the Capitol Building, in the City of Washington, District of Columbia, for the decision of the said Court thereon. Annexed hereto is a copy of the brief of the

argument to be submitted with the said motions in support thereof.

Dated: February 7th, 1906.

Yours, etc.,

JOHN GARBER,
Counsel for Defendant in Error
for the purposes of said motions.

FREDERIC D. MCKENNEY,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 274.

THE CITY OF MONTEREY,
Plaintiff in Error,

vs.

DAVID JACKS,
Defendant in Error.

MOTION TO DISMISS OR TO AFFIRM.

Now comes DAVID JACKS, the Defendant in error, by his counsel appearing in that behalf, and moves the Court to dismiss the writ of error in the two causes entitled as above, for want of jurisdiction, for the reason that the judgments or decrees to review which said writ has been taken are the judgments or decrees of the Supreme Court of one of the United States, to wit: of the Supreme Court of the State of California, and that there was not drawn in question in said causes, or in either of them, in the said Supreme Court, or elsewhere, the validity of any treaty or statute of, or of any authority exercised under, the United States; or the validity of any statute of, or of

any authority exercised under, the said State of California, or any other of the United States, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and also that no title, or right, or privilege, or immunity, under the Constitution, or any treaty or statute of, or commission held, or authority exercised under, the United States, was in said Supreme Court, or elsewhere, specially, or otherwise, or at all, set up or claimed by the said plaintiff in error;

And the said Defendant in error, by his counsel as aforesaid, moves this Court to dismiss the said writ of error upon the ground of irregularities in the said writ, in this: That the said writ has, contrary to law, been taken to review the two said judgments or decrees of the Supreme Court of the said State of California, each of which said judgments or decrees was rendered in a separate cause or suit, and also that it cannot be determined, to which, if to either, or to any, of said actions, the said writ applies;

And the said Defendant in error, by his counsel as aforesaid, also moves the Court to affirm the said judgments or decrees to review which the said writ of error has been taken, because, even if the records in said causes, or in either of them, should be deemed to show that this Court has jurisdiction in the premises, yet it is manifest that the questions upon which such jurisdiction is alleged to depend are so frivolous

as not to require further or extended argument upon the merits.

All of which said matters will fully appear from the following brief or argument of said Defendant in error annexed hereto.

JOHN GARBER,
Counsel for the Defendant in Error
for the Purposes of these Motions.

FREDERIC D. MCKENNEY,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 274.

THE CITY OF MONTEREY,
Plaintiff in Error,

vs.

DAVID JACKS,
Defendant in Error.

BRIEF OF THE ARGUMENT ON BEHALF OF DEFENDANT IN ERROR ON MOTION TO DISMISS OR TO AFFIRM.

This is a motion by the Defendant in error, David Jacks, to dismiss the writ of error by which the two causes entitled as above have been brought to this Court from the Supreme Court of the State of California, on the ground, briefly, that no federal question of any kind reviewable in this Court arose or was presented in the course of the proceedings in the State courts, and that no right, title, privilege or immunity under the Constitution or laws of the United States, was at any time, or in any manner, set up or claimed therein by the plaintiff in error. The motion to dismiss is based also on the further ground that, by a single writ, it has been attempted to bring up two separate causes for review. Coupled with said motion is a motion to affirm the judgments or decrees of

the Supreme Court of the State of California on the ground that even if this Court should deem that it has jurisdiction herein, it manifestly appears that the questions upon which said jurisdiction depends are so frivolous as not to require or call for any argument upon the merits.

A brief recapitulation of the proceedings in the State courts and a statement of the issues presented in said actions, are necessary to a complete understanding of these motions.

These actions were commenced by The *City* of Monterey, now plaintiff in error, in the Superior Court of the said State of California, in and for the *County* of Monterey, on December 19, 1891, and on November 17, 1896, respectively, to quiet its title to, and to recover the possession of, certain lands situate in said County, and to recover damages for the withholding thereof. The parties to both actions are the same, dismissals having been filed in the Superior Court as to all defendants, except defendant Jacks, and the issues and questions arising therein are identically the same, the actions differing only in respect to the premises respectively affected thereby. As said actions were tried, considered and submitted together in the Superior Court and in the Supreme Court of the State, we shall hereafter consider them together.

The suit was commenced by the filing of a complaint which, as is usual and customary under the laws of said State, averred only the ultimate facts of

the ownership of said lands by the plaintiff, an adverse claim thereto by the defendant, and a statement that the defendant had no estate or interest therein. The defendant, Jacks, answered generally, denying the averments of the complaint and the capacity of the plaintiff to maintain the action, and further set up in bar the plea of the Statute of Limitations. He also alleged title and right of possession in himself, but without praying for affirmative relief.

Upon the issues thus raised by the complaint and answer, the cause came on for trial, and the court thereafter found, generally, that The City of Monterey was not, at or prior to the commencement of the action, the owner or entitled to the possession of any part of the lands sued for, but that on the contrary the defendant Jacks was, at all said times, the owner and in possession thereof. As a conclusion of law, it found that the plaintiff was not entitled to any relief, and a decree in accordance with these findings was thereupon, on September 27, 1899, rendered in favor of the defendant in error. It may be stated, though not here material, that as to the other issues, namely, the plaintiff's capacity to sue and the Statute of Limitations, the findings were in favor of the plaintiff. From this decree, The City of Monterey appealed to the Supreme Court of this State, and said decree was by that Court, on July 11, 1903, affirmed. (*City of Monterey vs. Jacks,* 139 Cal. 542.)

The evidence introduced at the trial, and upon

which the said findings were based, established, in effect, these facts, the following statement of which is largely taken from the opinion of the Supreme Court of the State:

Monterey at the date of the cession of California to the United States was a Mexican pueblo, and, by special concession from the Spanish crown, was entitled to more than the four square leagues of land which, by the laws of Spain, were customarily allotted to pueblos. The city of Monterey was incorporated by an act of the legislature of the State of California, of date March 30, 1850, (Stats. of Cal. 1850, p. 131,) and thereunder succeeded to all the legal rights and claims of the former pueblo to its pueblo lands.

On March 2, 1853, said city, by its attorney, D. R. Ashley, duly retained for that purpose by the city, presented to the United States board of land commissioners appointed in pursuance of the act of Congress of March 3, 1851, (9 Stats. at L. 631,) its petition praying for a confirmation of the pueblo grant to the pueblo of Monterey, and a decree was made accordingly on January 22, 1856, confirming its title. An appeal was taken from this decree by the United States, which decree was on June 16, 1858, dismissed, with leave to the city to proceed upon the commissioners' decree as upon a final decree of confirmation. The patent of the United States to the City of Monterey was issued November 19, 1891, and includes the land in controversy.

In 1857, the original act incorporating the city of Monterey was amended, and by section 7 thereof it was provided as follows: "The trustees may also pay for the expenses of prosecuting the title of the city before the United States Land Commissioners and before the United States courts, and for that purpose may sell and transfer any property, right, or franchise, upon such terms and for such price as may by them be deemed reasonable." (Stats. of Cal. 1857, p. 55.)

On January 24, 1859, said Ashley presented to the trustees of the city of Monterey a claim amounting to $991.50 for services as its attorney in presenting such pueblo claim to the commissioners. The claim was approved and allowed, and, there being no funds in the treasury to pay it, the board of trustees passed a resolution directing that a sale of all the pueblo lands of the city, or so much of them as might be necessary to pay said claim, be made at public auction on February 9, 1859. Due notice of the time for holding said sale was given, and the same was held at the time and in accordance with the notice, at which sale the entire pueblo tract was bid in by the said Ashley and the defendant in error, David Jacks, for the sum of $1002.50, being the amount of the indebtedness and of the necessary expenses of sale; no one offering to purchase less than the whole, or to bid a higher amount. Thereafter said trustees made, executed and delivered a conveyance of said lands,

dated February 9, 1859, but acknowledged February 12, 1859, in favor of said Ashley and Jacks, and in the conveyance the proceedings taken by the trustees in the matter of the sale were recited. This conveyance was recorded in the office of the County Recorder of said County of Monterey on June 11, 1859.

While the matter is not, and cannot be, involved upon the present motions to dismiss or to affirm, and while upon any argument upon the merits, the court, we think, would decline to give any consideration to certain innuendoes and insinuations contained in the petition of the City of Monterey for the writ of error, to the effect that fraud was practiced by Ashley and by Jacks in procuring the execution to themselves by the trustees of Monterey of a deed to what is now claimed to have been the whole of its pueblo lands, yet the following statement of facts in relation thereto appears not to be improper.

As already stated, the four square leagues of land to which each pueblo was entitled under the Spanish and Mexican laws, was, in the case of the City of Monterey, increased by special concession from the Spanish crown, the grant to it, which was confirmed by the Mexican Department Legislature on July 24, 1830, aggregating about 60,000 acres. Prior to the conquest of California by the United States, there had been granted from these lands of the pueblo by the Territorial government of California various ranchos to numerous applicants, which ranchos ap-

pear to have together comprised about 25,000 acres, and which, it may well be surmised, were from those portions of the pueblo lands most valuable for agricultural and similar purposes. In addition to these ranchos, a large number of grants were made by the alcaldes or chief magistrates of the pueblo for residence and business lots, the record showing that one alcalde alone thus granted about 2,000 acres, and these grants, we also may infer, were from the pueblo lands most valuable therefor. The residue only of these 60,000 acres was the land acquired by said Ashley and by Jacks, the defendant in error, and of this residue portions were from three to ten miles from the actual town-site of Monterey and some portions were even fifteen miles distant therefrom. As bearing also upon the *value* of the lands acquired by them, it is significant that while grants of large tracts of land extending for hundreds of miles up and down the State were constantly sought for and were seldom refused by the Territorial authorities, yet no such disposition seems to have been made of these lands which must have remained vacant and unoccupied, notwithstanding that they were within the limits of the pueblo of Monterey, then a chief seaport and the head of the civil and military government of Upper California.

The truth is that the City of Monterey did not, by the deed of controversy, convey the whole of its pueblo lands, but merely the remnant thereof which

was of so little value that we do not know that any one ever made public his willingness to receive them from the Spanish or Mexican authorities as a gift.

Indeed, the *amount* of land conveyed to Ashley and to Jacks is a false quantity in this case. Even good land in the early California days was not only plentiful but cheap, and in San Francisco it is a matter of common knowledge that for sums far less than that paid by these gentlemen, numerous sales of undoubted validity were made by its magistrates of lots which at this day are worth hundreds of thousands and, in some cases, even millions of dollars.

Nor may it be said that Ashley, after having procured the confirmation before the tribunals of the United States of the city's title to its pueblo lands, thereupon received, together with Jacks, the whole thereof, upon their bidding an amount just sufficient to cover the fee for his professional services and the expenses of making the sale. The grants of the ranchos already noted were required by the Act of Congress of March 3, 1851, to be directly presented for confirmation, but as to the whole of the residue of the pueblo lands, including all building and residence lots theretofore granted by the alcaldes, the claim was required by the 14th section of the act to be presented by the City, and the confirmation of the City's title at the same time quieted that of all the holders of these lots which, it must be remembered,

were comprised in the 29,698.53 acres of land subsequently patented to the City.

Something may be said as to the *manner* in which the sale now complained of was made. Notice of the time and place thereof was given by posting notices, both in English and in Spanish, in three public places in the City for two weeks prior thereto, and by publication by two insertions in English in a newspaper published at Santa Cruz. The proposed sale, therefore, could not but have been a matter of general notoriety in what was then, and still continues to be, a small town, but despite what is now claimed to have been then and to now be the fabulous value of the lands in controversy, there do not appear to have been present any rival bidders offering to pay more than the amount actually owing, or any one willing to accept a smaller quantity of land in payment of the sum due, as the terms of the sale expressly permitted.

No issue whatever of fraud or of unfair practice has been raised by the pleadings, but because of the charges broadly hinted at by counsel, it is only just to the defendant in error that the preceding statement should be made. After forty years have elapsed since the sale, the City of Monterey should not, after so long a silence, endeavor to impeach and to nullify, by the claim of injustice or by innuendo, its own acts as well as the acts of the legislature by which it was created.

On April 2, 1866, the act to incorporate the city of Monterey was amended to read as follows:

> "Sec. 2. All sales and conveyances made by "the corporate authorities of said city since the "eighth day of February, 1859, and which con- "veyances purport to have been recorded in the "county recorder's office of Monterey county, "purporting to convey public lands, or lands "confirmed to said City of Monterey, in pur- "suance of the act of Congress of March 3, 1851, "(9 U. S. Stats. 631,) and entitled An Act to "ascertain and settle the private land claims in "the State of California, are hereby ratified and "confirmed."

On September 4, 1869, said D. R. Ashley conveyed to the defendant in error all his interest in the land in controversy.

While we do not understand that the briefs or arguments of counsel in the Supreme Court are properly a part of the record certified to this Court, or that it is incumbent on the defendant in error to himself negative the suggestion or possibility that a Federal question may have been presented therein, yet in justice to the Supreme Court of the State it may be said, that on the appeal, the City, by its counsel, contended only that the City of Monterey had no power to convey the whole of its pueblo lands, and that the deed of its trustees to said Ashley and Jacks purporting so to do was void upon its face; that, on

principles controlling the exercise of legislative power generally, and without any reference being made to the Constitution, treaties or laws of the United States, the legislature could not validate such a void deed nor dispose of the municipal property without the consent of the city, and, lastly, that the legislative control over lands held in public trust did not extend to a diversion thereof from the uses and purposes for which they were given or acquired. These contentions were each and all decided against the plaintiff, the Supreme Court in its opinion saying:

> "The question in the case is not what power "the pueblo or city of itself had over the pueblo "lands, but what power or control the legislature "had over them, and what authority it could "confer upon the city with reference to their "disposition, and to what extent it could ratify "an attempted but unauthorized sale thereof."

After an extended review of its decisions, the Court concluded:

> "We are satisfied from the above authorities "that while under the Mexican law the officers "of a pueblo were empowered to make grants "of the pueblo lands, yet the pueblos had no in- "defeasible proprietary interest in them; that "they were held in trust for public and munici- "pal purposes, subject to the control and dis-

" position of the Mexican government; that upon
" the establishment of our State government it
" succeeded to the same sovereignty over them
" as was exercised by the former government,
" and that their control and disposition came
" fully, entirely, and absolutely within the power
" of the legislature as representing such sover-
" eignty.

" And as the full and complete control of said
" lands was a matter within the power of the
" legislature, it could have originally conferred
" upon the trustees of the city of Monterey (if
" under the act it did not) the right to dispose
" of them. We think also that there is no doubt
" that the legislature had the power to confirm
" the deed in question, and that the act in ques-
" tion here operated to effect that purpose."

The Supreme Court of the State held further, that the act of the legislature of California of April 2, 1866, purporting to ratify certain conveyances theretofore made by the City of Monterey was sufficient to, and did, validate the deed of its trustees to said Ashley and to Jacks, the defendant in error, and that no constitutional objection to, or limitation upon, the power of the legislature in this respect had been pointed out.

A petition for a rehearing was filed by the City, but was denied without opinion.

At no time in the course of the proceedings in the courts of the State, either in the pleadings, or by motion, exception, instruction, or other action appearing as part or made a part of the record, were there "drawn in question" the validity of any statute or treaty of, or of any authority exercised under, the United States, or the validity of any statute of, or of any authority exercised, under the State of California, or any other of the United States, on the ground of their repugnancy to the Constitution, treaties or laws of the United States, nor was there specially or at all set up or claimed by the plaintiff in error any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States. In fine, no federal question of any kind was ever at any time or in any manner raised or invoked in those courts. We cannot do more than to affirm the fact, and if counsel for the plaintiff in error should in his reply assert that we are mistaken in this regard, we ask that he specifically point out when and where such questions were presented below. An examination of the record, however, will readily establish the correctness of this statement.

The City of Monterey in its petition for the writ of error assigns the following particulars wherein it appears to be claimed that federal questions arise in this case, namely:

1.—The validity of the treaty of Guadalupe Hidal-

go and of the act of March 3, 1851 (9 Stats. 631);

2.—The validity of the act of the legislature of th State of California approved April 2, 1866, confirm ing certain sales theretofore made by the City o Monterey;

3.—The title to the pueblo lands of said City, th fee to which is alleged not to have vested in it unt November 19, 1891, the date of the issuance of th patent of the United States, this assignment bein made under the third clause of section 709 of th Revised Statutes.

Having made this preliminary statement of the i sues involved in these actions, we are now able t proceed to the argument of the motions.

I.

THE WRIT OF ERROR SHOULD BE DISMISSE FOR WANT OF JURISDICTION.

At the outset, we wish to insist that the court without jurisdiction to consider the assignments o error made by the plaintiff in error, because not sea sonably made in the courts of the State. As alread stated by us, no federal question of any kind wa there raised, and the rule is so well settled as scarcel to require any citation of authority in this court tha the assignment of a federal question comes too lat unless the question has been presented for decisio in the State courts, or unless a right, title, immunit

or privilege claimed under the Constitution or laws of the United States has been specially set up or claimed in the State courts. We cite, however, a few of the later authorities on this point.

In *Caro vs. Davidson*, 197 U. S. 197, it is said:

> "Whether the Supreme Court of Florida, if "it sustained the decree of the Circuit Court in "denying the petition on either of the grounds "set up in defense, committed error conizable "here, or whether the act referred to was ap- "plied as asserted in contravention of the Con- "stitution of the United States, we are not called "upon to consider, since we do not find that any "federal question was so raised in the petition "or in the subsequent proceedings thereunder, "at the proper time and in the proper manner, "so as to give jurisdiction under Section 709 of "the Revised Statutes."

In *Bolln vs. Nebraska*, 176 U. S. 83, the Court also says:

> "We have repeatedly decided that an appeal "to the jurisdiction of this Court must not be a "mere after-thought, and that if any right, priv- "ilege or immunity is asserted under the Con- "stitution or laws of the United States it must "be specially set up and claimed before the final "adjudication of the case in the Court from "which the appeal is sought to be maintained."

See, also,

Levy vs. Superior Court, 167 U. S. 175;
Cockran Oil & D. Co. vs. Arnaudet, 26 Sup. Ct. Rep. 41, decided Nov. 13, 1905.
Scudder vs. Comptroller, 175 U. S. 32, 36.

Equally well settled is it, that the petition for the writ of error and the assignments of error, although setting up federal questions, do not form any part of the record upon which this court takes action, and that any assignments of federal questions made therein for the first time come too late to give this court jurisdiction. Indeed it is held, when a federal question is first raised in a petition to the State court for a rehearing of the cause, even though it be fully and adequately presented, if the State court declines to pass upon it because not seasonably made in accordance with its rules and practice, that this court has no jurisdiction to consider the question thus sought to be raised.

Neither is it sufficient that the record in the State court or the rights of the parties reflected thereby would have admitted of the presentation of a federal question which, from the ultimate decision of the State court, must have been decided adversely to the party claiming under it. If in fact such question was not presented or raised and not, therefore, drawn to the attention of the State court, it was not "drawn in question" within the contemplation of the Act of Congress and cannot, therefore, be made the basis of

an application for a writ of error. The federal question must be unmistakably and specifically "drawn in question".

> "The jurisdiction of this Court to re-examine "the final judgment of a State court cannot arise "from mere inference, but only from averments "so distinct and positive as to place it beyond "question that the party bringing a case here "from such court intended to assert a federal "right."
>
> *Oxley Stave Co. vs. Butler County,* 17 Supreme Crt. Rep. 709-711.

Citing and reviewing:

Maxwell vs. Newbold, 18 How. 511, 516;
Crowell vs. Randall, 10 Pet. 368;
Hoyt vs. Sheldon, 1 Black, 518, 521;
Sayward vs. Denny, 158 U. S. 180, 3, 4, 6.

And even in those instances in which a federal question is "drawn in question" and it appears that the decision below was adverse to the plaintiff in error upon two independent grounds, one of which is not a federal question, the judgment of the State court will be affirmed.

Murdock vs. Memphis, 20 Wall. 590;
Adams County vs. B. & M. R. R., 112 U. S. 123;
De Saussure vs. Gaillard, 127 U. S. 216;
Hopkins vs. McLure, 133 U. S. 380;
Hammond vs. Johnston, 142 U. S. 73.

And where a defense is distinctly made, resting on local statutes, this Court will not, in order to reach a federal question, resort to critical conjecture as to the action of the State court in the disposition of such defense.

Johnson vs. Risk, 137 U. S. 300, 307.
Cockran Oil & D. Co. vs. Arnaudet, supra;
Leeper vs. Texas, 139 U. S. 462.

We now proceed to a detailed discussion of the assignments made in this case:

The first assignment evidently refers to the first clause of Section 709 of the Revised Statutes, but the record does not show that there was "drawn in question" in the State courts the validity either of the treaty of Guadalupe Hidalgo or of the act of Congress of March 3, 1851 (9 Stats. 631), providing for the ascertainment and settlement of private land claims in California, nor does it show that the validity of said act or treaty could possibly have been involved in the action or that a decision thereon could have been necessary to its determination. This, of itself, as already pointed out, deprives the court of jurisdiction to consider this assignment.

However, it is apparent that the *validity* of the treaty and of the act could scarcely have been contested by either party to the action, as they formed the basis of the rights of each. As it is well known, by that treaty the territory of which California now forms a part was ceded to the United States, and the

act of Congress was intended to carry out the obligation imposed by the treaty upon the federal government to protect the rights of private land claimants under the Mexican or Spanish laws. That no federal question was here involved is absolutely foreclosed by the repeated decisions of this court, some of them in reference to this same act and treaty.

In *Blackburn vs. Portland Mining Co.*, 175 U. S. 571-579, the Court said:

> "This court has frequently been vainly asked "to hold that controversies in respect to lands, "one of the parties to which had derived his "title directly under an act of Congress, for that "reason alone presented a Federal question. "Thus, in *Romie vs. Casanova*, 91 U. S. 379, "which was an action brought to recover the "possession of certain lands in the City of San "Jose, the question to be determined was, which "of two parties had actually obtained a grant "of the particular premises in question. The "title of City had originated before the cession "of California to the United States, but this "Court said: 'The title of the city was not "'questioned. Even if it depended on the treaty "'of Guadalupe Hidalgo and the several acts of "'Congress to ascertain and settle private land "'claims in California, the case would not be "'different. Both parties admit that title and "'their litigation extends only to the determina-

"'tion of the rights which they have severally "acquired under it.' Accordingly the writ of "error to the Supreme Court of California was "dismissed for want of jurisdiction."

In *Kennard vs. Nebraska*, 186 U. S. 304, the Court said:

"It has often been held that the validity of a "statute or treaty of the United States is not "'drawn in question' within the meaning of sec- "tion 709, every time rights claimed under a "statute or treaty are controverted, nor is the "validity of an authority every time an act done "by such authority is disputed."

Citing,

Baltimore etc. R. R. Co. vs. Hopkins, 130 U. S. 210;

Cook County vs. Canal Company, 138 U. S. 635;

Blackburn vs. Portland Mining Co., 175 U. S. 571;

Florida Central R. R. Co. vs. Bell, 176 U. S. 321-328;

Water Power Co. vs. Street Ry. Co., 172 U. S. 488.

See also, to the same point,

California Powder Works vs. Davis, 151 U. S. 389;

California vs. Jackson, 112 U. S. 237;

DeLamar's Nevada Gold Mining Co. vs. Nesbitt, 177 U. S. 523.

The second assignment of error goes to the alleged repugnancy to the Constitution, treaties and laws of the United States, of the Act of the Legislature of California of April 2, 1866, ratifying the sale by the trustees of the City of its pueblo lands to Ashley and to Jacks, the defendant in error. Here again it is to be noted, that in the State courts, the validity of this Act was not "drawn in question" on any such ground. True it is, that the power of the Legislature to enact it was denied, but, as said by the Supreme Court of the State in its opinion, "while the appellant has challenged the constitutionality of this confirmatory act, it is nowhere pointed out what particular provision of the Constitution has been violated", and still less was any reference made to the Constitution, or to any treaty or law, of the United States. It is well settled that a general reference to the Federal Constitution is not sufficient (*Cockran Oil & D. Co. vs. Arnaudet, supra*), but the provisions specially relied upon must be specifically pointed out. Not even in the assignments of error has this been attempted to be done.

The decision of the Supreme Court of the State was based upon a consideration of the relations existing between the State and the pueblo as a governmental subdivision thereof, and of the extent of the legislative control over the pueblo lands held, as they were, not in private ownership, but subject to certain public trusts. This, it need hardly be said, does not

present any Federal question. Indeed, it is apparent from the Court's opinion that it decided the case quite without thought that any federal question was, or could be, involved in its determination. The case at bar is on this point completely covered by that of

Scudder vs. Comptroller of New York, 175 U. S. 32, 36,

where it is said:

> " No mention of the Constitution of the United " States, or of any provision thereof, by the " plaintiff in error, or by the court, is to be found " at any stage of the case while it was pending in " the courts of the State of New York; and it " is impossible, upon this record to avoid the con- " clusion that it never occurred to the plaintiff in " error to raise a federal question until after the " case had been decided against him in the high- " est court of the State.
>
> " In order to give this court jurisdiction of a " writ of error to review a judgment which the " highest court of a State has rendered in favor " of the validity of a statute of or an authority " exercised under a State, the validity of the " statute or authority must have been 'drawn in " 'question' on the ground of their being repug- " nant to the Constitution, laws or treaties of " the United States. When no such ground has " been presented to or considered by the courts " of the State, it cannot be said that those courts

"have disregarded the Constitution of the "United States and this court has no jurisdic- "tion."

Citing,

United States Revised Statutes, 709;
Murdock vs. Memphis, 20 Wall. 590, 633, 634
Levy vs. Superior Court, 167 U. S. 175;
Miller vs. Cornwall Railroad, 168 U. S. 131;
Columbia Water Power Co. vs. Columbia Railway, 172 U. S. 475, 488.

The third assignment of error is apparently based upon the theory, that as the patent of the United States to the City of Monterey did not issue until November 13, 1891, the title of the City to the lands therein described was wholly unaffected by any disposition or attempted disposition thereof theretofore made by it.

Here again, however, there is encountered the objection already made generally in regard to all of the assignments, and one which applies with particular force to this assignment coming, as it evidently does, under the third clause of Section 709, that no right or title claimed by the City thus to have been acquired by it was ever *"specially set up or claimed"* in the courts of the State of California. This objection is fatal to the jurisdiction of this court, as fully appears from the cases already cited as well

as from the following authorities which more specifically relate to this part of the section.

Mutual Life Ins. Co. vs. McGrew, 188 U. S. 291;

Telluride Power etc. Co. vs. Rio Grande etc. Co., 175 U. S. 639;

Sayward vs. Denny, 158 U. S. 180;

Morrison vs. Watson, 154 U. S. 111;

Miller vs. Texas, 153 U. S. 535;

Oxley Stave Co. vs. Butler Co., 166 U. S. 648;

Chicago etc. Railway Co. vs. Chicago, 164 U. S. 454;

Poewll vs. Brunswick Co., 150 U. S. 433;

Roby vs. Colehour, 146 U. S. 153;

Spies vs. Illinois, 123 U. S. 131;

Columbia Water Power Co. vs. Columbia etc. Co., 172 U. S. 475;

Home for Insurables vs. New York, 187 U. S. 155.

But in another aspect of the case, this court is without jurisdiction to consider this assignment of error. The conflicting rights of persons each admittedly claiming under a patent of the United States, do not, as already shown, present a federal question.

Blackburn vs. Portland Mining Co., supra; Kennard vs. Nebraska, supra.

However, apart from these considerations, it is clear that this assignment fails to raise a federal

question. The trustees' deed to Ashley and Jacks "granted, bargained and sold" the interest of the City "including and comprising all the right, title and interest which said City has or may have, whether in possession or in expectancy", in and to said lands, and, not only by reason of these express words, but also upon familiar principles of law recognized and enforced in this State (Civil Code, Sec. 1106), passed to the grantees the benefit of whatever title was thereafter acquired by the City.

Equally mistaken in this regard is counsel for plaintiff in error as to the *effect* of the patent, as to which there can no longer be any room for controversy in this court.

In *United States vs. Conway*, 175 U. S. 70, it is said:

> "But the United States in dealing with the "parties claiming under Mexican grants lands "within the territory ceded by the treaty of "Mexico, never made pretense that it was the "owner of them. When, therefore, guided by "the action of the tribunals established to pass "upon the validity of the alleged grants, the "government issued a patent, it was in the na- "ture of a quit-claim—an admission that the "rightful ownership never had been in the "United States, but had passed at the time of "the cession to the claimant, or to those under "whom he claimed. This principle has been

"more than once clearly enounced by this
"court."

In *Langdeau vs. Hanes,* 21 Wall. 521, the Court says:

"In the legislation of Congress a patent has a
"double operation. It is a conveyance by the
"government, when the government has any in-
"terest to convey; but where it is issued upon
"the confirmation of a claim of a previously ex-
"isting title it is documentary evidence, having
"the dignity of a record, of the existence of that
"title, or of such equities respecting the claim as
"justify its existence and confirmation. The in-
"strument is not the less efficacious as evidence
"of previously existing rights because it also
"embodies words of release or transfer from the
"government."

In *Beard vs. Federy,* 3 Wall. 478, 491, it is said:

"In the first place, the patent is a deed of the
"United States. As a deed, its operation is that
"of a quit-claim, or rather a conveyance of such
"interest as the United States possessed in the
"land, *and it takes effect by relation at the time*
"when proceedings were instituted by the filing
"of the petition before the Board of Land Com-
"missioners."

In the leading case of *Landes vs. Brant,* 10 How. 373, it was held, that when an imperfect Spanish

title was sold on execution in an action against the person seeking its confirmation, the perfect title subsequently granted to the execution debtor by the patent of the United States, enured by virtue of the doctrine of relation to the benefit of the purchaser at the sale. This ruling has been consistently adhered to in this court.

While in a narrow view of the case, this assignment might be deemed sufficiently to present a federal question for determination by this court, yet, in the last analysis, it merely involved the matter of conflicting rights based upon the effect of a conveyance made by a confirmee, and this, it already sufficiently appears, does not, of itself, present such a question.

For all of the foregoing reasons, it is, therefore, submitted that the writ of error should be dismissed.

II.

THE WRIT OF ERROR SHOULD BE DISMISSED FOR IRREGULARITY IN THE PROCEEDINGS.

As we have previously stated, there has been attempted to bring to this court for review, by a single writ of error, two distinct causes heretofore pending in the Supreme Court of California. While these actions presented the same issues and differed only in regard to the lands affected by each, it does not appear from the record that they were at any time

consolidated. Section 709 of the Revised Statut which defines the jurisdiction of this court in th regard, provides only that the final judgment or d cree of a State court "in any suit" may be review upon *"a* writ of error", and we are not familiar wi any rule or practice in this court or in the lower fe eral courts which permits more than one suit to presented for review at any one time by a sing writ of error. While this court, as far as we are a vised, has never been called upon directly to deci this point, probably for the reason that it has seldo arisen, it has nevertheless on at least one occasi strongly expressed its opinion as to its irregularity.

In *Brown vs. Spofford,* 95 U. S. 474, it said:

> "Such proceedings are palpably irregula
> "but inasmuch as they are not made the subj
> "of objection by either party, the court has c
> "cided to exercise jurisdiction and dispose
> "the controversy."

In other jurisdictions this practice does not appe to be permitted.

7 Am. & Eng. Enc. of Prac., 855.

III.

THE MOTION TO AFFIRM SHOULD BE GRANTED, FOR THE REASON THAT THE FEDERAL QUESTIONS SET UP ARE MANIFESTLY FRIVOLOUS AND WITHOUT MERIT.

The authorities in this court are numerous and recent that the bare suggestion of a federal question will not, without more, enable the court to take jurisdiction, unless it further appears that some fair reason exists for setting up the claim, and that, unless there is at least the color of merit in the question upon the assertion of which said jurisdiction is endeavored to be sustained, the writ of error will be dismissed. These cases, we submit, apply *a fortiori* where the court, having decided to entertain jurisdiction, is then called upon to say whether or not the question presented for decision is so frivolous as not to require an extended consideration upon the merits, and they also furnish at the same time an admirable test of the nature of the question which is to be deemed so frivolous that a claim thereof will be insufficient to confer jurisdiction upon this court.

In *New Orleans Waterworks Co. vs. Louisiana*, 185 U. S., pp. 336, 344, it is said:

> "It has long been the holding of this court "that in order to warrant the exercise of juris- "diction over the judgments of State courts, "there must be something more than a mere

"claim that a federal question exists. There
"must, in addition to the simple setting up of
"the claim, be some color therefor, or, in other
"words, the claim must be of such a character
"that its mere mention does not show it destitute of merit; there must be some fair ground
"for asserting its existence, and, in the absence
"thereof, a writ of error will be dismissed, al-
"though the claim of a federal question was
"plainly set up."

In *Sawyer vs. Piper,* 189 U. S. 154, the Court says:

"While they thus asserted the existence of a
"federal question, yet it is well settled that the
"mere averment of such a question is not suffi-
"cient. As was said in *Hamblin vs. Western Land Company,* 147 U. S. 531, 532: 'A real
"'and not a fictitious, federal question is essen-
"'tial to the jurisdiction of this court over the
"'judgments of State courts. (*Millinger vs. Hartupee,* 6 Wall. 258; *New Orleans vs. New*
"'*Orleans Water Works Co.,* 142 U. S. 79, 87.)
"'In the latter case it was said that: "the bea
"averment of a federal question is not in all
"cases sufficient. There must be at least color
"of ground for such averment, otherwise a fed-
"eral question might be set up in almost any
"case, and the jurisdiction of this court invoked
"simply for the purpose of delay."'"

See also, to the same point:

St. Louis etc. Ry. Co. vs. Missouri, 156 U. S. 478, 484;

McCain vs. Des Moines, 174 U. S. 171;

New Orleans vs. New Orleans Waterworks Co., 142 U. S. 79;

Wabash Ry. Co. vs. Flannigan, 192 U. S. 29;

Wilson vs. North Carolina, 169 U. S. 586.

In view of the somewhat extended consideration which has been given to the assignments of error upon the argument of the motion to dismiss for want of jurisdiction, it is believed that there is not now required more than a brief discussion of the questions which they present.

By the first assignment of error it appears to be claimed that the Supreme Court of California has somehow decided against the validity of the Treaty of Guadalupe Hidalgo and of the Act of Congress of March 3, 1851. Even at first blush this contention would seem to be absurd, as it can only be upon the assumption of their validity that the defendant in error has any title at all, since he claims solely as the grantee of the City and the City's title necessarily depends upon such validity. However, as we have already abundantly shown, the mere fact that the City itself thus derives its title, entirely fails to import a federal question into this case.

In regard to the second assignment of error which is based upon the alleged repugnancy of the Act of

the Legislature of California of April 2, 1866, to the Constitution, laws and treaties of the United States, it seems enough to say that not only was no such contention made in the State court, but hat the court rested its decision solely upon a consideration of the relations existing betwen the State and its pueblos. a question of purely local, administrative law, and in nowise presenting a federal question. This *ratio decidendi* is amply broad enough to sustain the decision of the State court.

The third assignment of error is based upon the claim that the title of the City of Monterey to its pueblo lands was acquired only by virtue of the patent of the United States and was not affected by the deed of its trustees to Ashley and Jacks. But not only was this deed, explicitly confirmed, as it was, by the State legislature, sufficient in form and by reason of the express words contained therein, sufficient to carry any title thereafter acquired by the City, but, as we have seen, it is settled in this court beyond any possibility of successful attack that the patent took effect by relation to the time when proceedings for the confirmation of the City's title were instituted before the Board of United States Land Commissioners. This question, moreover, appears to be one relating more particularly to the general law of real property.

We venture, therefore, to say that the frivolousness

of the federal questions attempted to be set up herein has been sufficiently shown.

It is, therefore, submitted that the writ of error should be dismissed for want of jurisdiction as well as also for irregularity in the proceedings, or, if the court should decide to entertain jurisdiction, that the judgments of the Supreme Court of the State of California should at this time be affirmed for the reason that the federal questions upon which that jurisdiction has been sought to be here sustained, are manifestly frivolous and without merit.

Respectfully submitted,

JOHN GARBER,

Counsel for the Defendant in Error for the Purposes of said Motions.

FREDERIC D. MCKENNEY,

Of Counsel.